APPEAL NO. 010876
FILED JUNE 8, 2001

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on April 3, 2001. The hearing officer determined that the first impairment rating (IR) assigned to the respondent (claimant) did not become final by operation of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE 130.5(e) (Rule 130.5(e)) because it was disputed within 90 days of the date that the claimant received the IR.

The appellant (self-insured) has appealed and argues that because a letter that it sent uncertified, containing the IR report, was not returned to it by the post office, it should be presumed received, meaning that the first IR was not disputed within 90 days. The claimant responds that she notified her employer and the U.S. Postal service of her change of address when she moved, and the fact that the self-insured's claims adjuster mailed the IR to the wrong address does not charge her with receipt of this document.

DECISION

We affirm the hearing officer's decision.

The hearing officer did not err in finding that the claimant first learned of the IR on November 30, 2000, and disputed it that day. The claimant slipped and fell on _____, while employed by a governmental entity that is represented on its workers' compensation claims through the self-insured. A Report of Medical Evaluation (TWCC-69) was completed and signed by two doctors, one of whom was the claimant's treating doctor. This report assigned a zero percent IR and found that the claimant reached maximum medical improvement on June 28, 1999. The claimant said that she had an appointment that day and that no measurements were performed or IR discussed, but that he told her she could not possibly be hurting because she had only a strain, and he had done all he could for her.

The self insured mailed the claimant the first IR certification, on July 6, 1999. According to the adjuster's affidavit, this was mailed to the claimant by regular and certified mail to the address where she resided when she was injured. The claimant said that she no longer resided at that address, and for the period of time that the IR was sent had lived at another address since May 13, 1999, until October 1999. She said that she had not lived at the earlier address since November 1996 but while a foreclosure was pending she received some mail. She also testified that the house came out from under foreclosure in 1998 and that she stopped receiving mail in August or September of 1998 at the address. She moved to several places after that and had her mail forwarded twice. Although the claimant disputed the IR when the Texas Workers Compensation Commission (Commission) informed of it, she did not actually receive a written copy until January 5, 2001.

Under the version of Rule 130.5(e) in effect in 1999, the 90-day period runs from actual receipt of written notice of the first IR, Texas Workers Compensation Commission Appeal No. 000137, decided March 6, 2000; the self-insured must show not only that the first IR was mailed to last address it had for the claimant, but that she actually received that notice. We have held that Rule 130.5(e) will not be applied where the first IR was mailed to the wrong address. Texas Workers Compensation Commission Appeal No. 010088-S, decided February 26, 2001. The self-insured's assertion that the claimant can be presumed to have received the regular mail copy is refuted by the returned certified mail envelope which is in evidence. This carries a United States Postal Service notation advising to return to sender, because the forwarding expired. This corroborates the claimant's testimony concerning the fact that she no longer lived there. The Dispute Resolution Information System notes indicate that the notice from the Commission which included the first IR was also mailed out and returned undelivered in July 1999. These notifications are sent by regular mail.

Because the certification did not become final under the version of Rule 130.5(e) then in effect, we must now consider whether it has become final under rule as amended on March 13, 2000. Texas Workers' Compensation Commission Appeal No. 010088-S decided February 26, 2001. See Rule 130.5(f) (effective March 13, 2000) stating that the amended rule applies to certifications of MMI and IR that did not become final prior to the effective date of the amendment. Rule 130.5(e) now provides, in pertinent part, that the disputed within 90 days after written notification of the MMI/IR is sent by the Commission to the parties. As stated above, the evidence shows that the Commission sent written notice of Dr. S's certification to the claimant at the wrong address and that it was returned. Given these facts, we cannot conclude that the 90-day period, under amended Rule 130.5(e), was triggered by the Commission letter. (See Texas Workers' Compensation Commission Appeal No. 002905-S, decided February 1, 2001, regarding computation of the 90-day period under the amended Rule 130.5(e)). Accordingly, the hearing officer's determination, with regard to amended Rule 130.5(e), that the first certification did not become final is not so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. Cain v. Bain , 709 S.W.2d 175, 176 (Tex. 1986).

Finding the self-insured's arguments totally without merit, we affirm the hearing officer's decision and order, finding it supported by the record.

Susan M. Kelley
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Gary L. Kilgore
Appeals Judge